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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, PLAINTIFF IN error,
v.
THE WESTERN UNION TELEGRAPH COMPANY and the Union Pacific Railway Company.
No. 131.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This was an action at law in the circuit court, brought by the United States to recover from the Western Union Telegraph Company and the Union Pacific Railway Company the sum of $12,495.62, which had been paid by the Government to the Western Union Telegraph Company from time to time after July 1, 1881, for telegraph services rendered to the Government over the telegraph line on the Union Pacific Railway. The recovery was sought

upon the ground that the payments so made to the Telegraph Company were "for services rendered to the Government which the Railway Company was under obligation to render by virtue of the provisions of the Pacific Railway Company's acts, and the compensation for which, [under those acts] was to be withheld and applied to the satisfaction of the indebtedness of the Railway Company to the Government." (Complaint, par. 5; Rec., p. 5.) And that the Telegraph Company in receiving the moneys "was chargeable with notice of the obligations of the Pacific Railway Company to the Government of the United States for a specific appropriation of the moneys so received." (Complaint, par. 7.)

The case was tried to a jury upon an agreed statement of facts (Rec., p. 42). The Government moved the court to direct a verdict in its favor, and the defendants moved for a verdict in their favor. The Government's motion was overruled, and that of the defendants granted, to both of which orders the Government duly excepted (Rec., p. 71), and in accordance with the direction of the court a verdict was rendered and judgment entered for the defendants. A bill of exceptions was taken by the Government (Rec., pp. 42–75), which sets forth the agreed statement of facts and the opinion of the circuit judge in directing a verdict for the defendants.

ASSIGNMENT OF ERRORS.

The plaintiff in error respectfully submits that the circuit court erred in directing a verdict for the defendants, and in refusing to direct a verdict for the plaintiff.

ARGUMENT.

THE QUESTION STATED.

The agreed statement of facts was evidently framed with a view to raising the question of the validity of the agreement of July 1, 1881, between the Railway Company and the Telegraph Company. That question was much discussed in case No. 648, which is now under submission, but it does not seem to be material to this case how the question is decided, for the Government was not a party to the agreement, and, whether valid or invalid, it can not affect or alter the obligations of the parties to the Government. Such was the view of the circuit judge. He said in his opinion (Rec., p. 73):

> Inasmuch as this agreement could in no way alter the obligations which the contracting parties owed to the Government under the statutes above referred to, it is not necessary to discuss its validity.

The question, therefore, is what obligations with respect to telegraph service the Railway Company owed the Government, and whether the relations established between the Railway Company and the Telegraph Company by the agreement of July 1, 1881, were such as to make the Telegraph Company responsible to the Government for the performance of those obligations.

It is admitted (Agreed Statement, Item 3, Rec., p. 45) that "the Western Union Telegraph Company has continued to operate the telegraph lines named in the agreement from that date [July 1, 1881] down to the present time, and both parties to said contract have carried out the provisions of the same and are now doing so."

THE TELEGRAPH OBLIGATIONS OF THE RAILWAY COMPANY TO THE GOVERNMENT.

The Union Pacific Railway Company, or its predecessors in interest, whose obligations and liabilities it has assumed, received large grants of lands and bonds from the United States under the acts of July 1, 1862 (c. 120, 12 Stat., 489), and of July 2, 1864 (c. 216, 13 Stat., 356), for the purpose of constructing and maintaining its line of railway and telegraph. Section 6 of the act of 1862 provides as follows:

> That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any Department thereof, and that the Government shall at all times have the preference in the use of the same, for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); *and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid.* Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; *and after said road is completed, until said bonds and interest are paid, at least five percentum of the net earnings of said road shall also be annually applied to the payment thereof.*

By the act of 1864 the Government made additional grants of lands and bonds in aid of the construction of the railway and telegraph, and by section 15 of that act provided—

> That the several companies authorized to construct the aforesaid roads are hereby *required to operate and use said* roads and *telegraph for all purposes of communication*, travel, and transportation, *so far as the public and the Government are concerned, as one continuous line, etc.*

The act of May 7, 1878 (c. 96, 20 Stat., 56), commonly known as the Thurman Act, provided by section 2—

> That the whole amount of compensation which may, from time to time, be due to said several railroad companies, respectively, for services rendered for the Government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid, and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking fund hereinafter provided, for the uses therein mentioned.

Under these statutes the railway company constructed the telegraph lines over which the services in question in this case were rendered, and the compensation for such service was liable to be retained and applied as provided for in those acts, and to be appropriated to the payment of the bonds and interest until the whole amount of the bonds and interest were fully paid. The agreed statement of facts admits (Item 2, Rec., p. 43) that "the interest on the bonds issued in aid of the road has never been reim-

bursed in full by the railroad company to the United States, and, if in this action the whole amount claimed by the plaintiff is recovered, there will still be a large deficit due from the railroad company on account of such interest, over and above all payments made or credits given."

THE EFFECT OF THE CONTRACT OF JULY 1, 1881.

We submit that the effect of the agreement of July 1, 1881, between the Railway Company and the Telegraph Company, and of the operation thereunder by the Telegraph Company of the telegraph line which had been built by means of these public subsidies, was to make the Telegraph Company liable to the Government for the performance of the telegraph service due to it from the Railway Company.

The preamble of the agreement (Exhibit 3, Rec., p. 56) recites that it is made for the purpose, among other things, "of fulfilling the obligations of the Railway Company to the Government of the United States * * * in respect to the telegraphic service required by the act of Congress of July 1, 1862, and the amendments thereto."

Article 4 (Rec., p. 57) declares that "all of the telegraph lines and wires covered by this contract, whether belonging to or used by the Telegraph Company or the Railway Company, for the purposes of this contract as herein provided, *shall form part of the general system of the Telegraph Company*," and by article 14 (Rec., p. 62) the Telegraph Company agreed "to assume and protect the Railway Company from the payment of all taxes levied and assessed upon the telegraph property belonging to either of the parties to this agreement."

Article 4 further provides (Rec., p. 58) that the employees of the Railway Company "shall transmit, over the lines owned, controlled, or operated by the parties hereto, all commercial telegraph business offered at the Railway Company's offices, and *shall account to the Telegraph Company exclusively for all of such business and the receipts thereon* as provided herein;" and "that if any person or party, or *any officer of the Government tender a message* for transmission over the railway telegraph lines between Council Bluffs and Ogden at any railway telegraph station between those points, and require that the service be rendered by the railway company, the operator to whom the same is tendered shall receive and forward the same accordingly, at rates to be fixed by the railway company, to the point of destination, if not beyond its own lines. * * * *Provided, however*, That the *local receipts of the Railway Company on such messages shall be divided between the parties hereto* in the same manner, and subject to the same conditions as provided in the tenth clause of this agreement."

Turning to the tenth clause of the agreement (Rec., p. 60), we find that "at all telegraph stations of the Railway Company, its employees shall receive, transmit, and deliver such commercial or *public* messages as may be offered, and *shall render to the Telegraph Company monthly statements of such business and full accounts of all receipts therefrom, and the Railway Company shall cause all of such receipts to be paid over to the Telegraph Company monthly;*" and the Telegraph Company agrees "to return to the Railway Com-

pany monthly one-half of the cash receipts at telegraph stations maintained and operated by and at the expense of the Railway Company."

By article 6 (Rec., p. 59) "the Telegraph Company agrees to furnish at its own expense all blanks and stationery for commercial or public telegraph business, and all instruments and main local batteries and battery material for the operation of its own and the Railway Company's wires and offices."

According to article 11 (Rec., p. 61), "the Telegraph Company covenants and agrees to save the said Railway Company harmless and indemnify it against any loss or damages * * * from any neglect or failure in the ransmission or delivery of messages for any person doing business with said Telegraph Company or on account of any other public or commercial telegraph business, for which said Railway Company is to account under article tenth hereof."

With respect to the operation of the telegraph line under this contract, the agreed statement of facts stipulates (Item 3, Rec., p. 45) that—

> In doing business under the contract of 1881 no record was kept, and it is now impossible to prove over what particular wire or wires the messages set out in the plaintiff's bill of particulars were actually transmitted, but a part were sent over what, prior to 1881, were the wires of the railroad company and the balance over the wires owned by the telegraph company.

And again (Rec., p. 45):

> Since the contract of 1881 the telegraph company and the railroad company have not maintained dis-

tinct offices or employed different sets of telegraph operators except at some of the larger towns and cities, where the Western Union Telegraph Company has, in addition, established separate offices for the transaction of commercial business away from the line of the railroad, but the offices have been in common and the same set of operators had done the work required by both the telegraph company and the railroad company.

And also (Item 5, Rec., p. 46), that—

The amount of messages set out in the plaintiff's bill of particulars correctly states the date of each message therein set forth, the sender of the same, and from what point to what point the same was transmitted by the Western Union Telegraph Company; *the amount collected by the Western Union Telegraph Company for the transmission of the same;* the proportionate amount of the whole sum thus paid to the Western Union Telegraph Company, which was for the bonded portion of the telegraph lines along the railways of the Union Pacific Railway Company, *such sum being such proportionate amount of the whole amount paid as the distance along the bonded portion of the telegraph along said line or lines of railway bears to the whole distance the message was transmitted from the point of origin to the point of destination;* that the compensation for each of the messages was computed and paid for as one entire service and at the then ruling rate for such entire distance fixed by the Postmaster-General of the United States, in accordance with section 5266 of the Revised Statutes of the United States; all of said messages were delivered to the Western Union Telegraph Company by the agent or officer of the Government sending the same, written upon the Western Union Telegraph Company's blanks and directed to the

receiver of such message at the point of destination and without any direction to transmit the same over the bonded portion of the line of telegraph of the Union Pacific Railway Company for the whole or any part of the distance; *but it was known to the Western Union Telegraph Company, from the character of the said messages, that they were from one officer or agent of the Government to another;* that at all the times the said messages were thus transmitted by the Western Union Telegraph Company at the rates annually fixed by the Postmaster-General of the United States, the ordinary rates, known as commercial rates, charged to other persons for transmitting like messages for the same distances was very much in excess of the rates fixed by the Postmaster-General; that the ordinary or commercial rate upon the bonded portion of the lines of telegraph situated along the lines of railway of the Union Pacific Railway Company was likewise very much in excess of the rates fixed by the Postmaster-General of the United States during the period covered by the account in this action; that as to a large number of messages included in said bill of particulars, and known as Signal-Service reports, the same were transmitted under special arrangement and differently from other classes of messages, upon what were known as "circuits," with "drops" at all places receiving the said Signal-Service reports. The method of doing said business was as follows: As many places as the Chief Signal-Service Officer desired should receive the said Signal-Service report were connected upon one continuous line of telegraph called a "circuit," and the said reports were then sent over this wire, and at each point where said reports were received an operator took the said reports, each of said points

thus receiving the report being called a "drop," and all of said points receiving the said reports at the same time; that by reason of this method of sending reports a specially low rate was made therefor, the said rate being fixed by the Postmaster-General in the circulars issued annually, and upon the basis of amount of matter and number of drops and extent of circuits; that the circuits for the transmission of said Signal-Service reports were made up between the points named in the account in this action, and included intermediate points or drops in each case; *that the amount sought to be recovered in this action is such proportionate amount of the whole amount paid as the distance along the bonded portion of the telegraph lines upon the said line or lines of railway bears to the whole distance over which such messages or reports were sent.*

We submit that the purpose and effect of the contract of July 1, 1881, was to transfer the telegraph franchise and business of the Railway Company to the Telegraph Company, and that the Telegraph Company took the grant, so far as the Government was concerned, subject to the conditions upon which the Railway Company was bound to perform the services, one of which was that the compensation due from the Government for the services should be applied in discharge of certain obligations of the Railway Company to the Government. If this be a sound view, the circuit court erred in directing a verdict for the defendants, and its judgment should be reversed. That court dealt with the case as if the Railway Company had maintained a separate and independent telegraph line, such as was contemplated by its charter, and upon that assump-

tion the court held that the Government had voluntarily elected to employ the Telegraph Company instead of the Railway Company.

With respect to the form of action, the Thurman Act of May 7, 1878 (c. 96, 20 Stat., 56, 60), declares:

> That it is hereby made the duty of the Attorney-General of the United States to enforce, by proper proceeding against the said several railroad companies, respectively or jointly, or against either of them, and others, all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and *in any suit or proceeding* already commenced, or *that may be hereafter commenced*, against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, *it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties* arising out of the matters and acts hereinbefore stated and referred to.

It is respectfully submitted that the judgment should be reversed.

LAWRENCE MAXWELL, Jr.,
Solicitor-General.

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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 131.

THE UNITED STATES OF AMERICA,
Plaintiff.

vs.

THE WESTERN UNION TELEGRAPH COMPANY and THE UNION PACIFIC RAILWAY COMPANY,
Defendants.

BRIEF OF THE WESTERN UNION TELEGRAPH COMPANY.

RUSH TAGGART,
Attorney for Western Union Telegraph Co.,
195 BROADWAY,
New York City.

C. G. Burgoyne, Walker and Centre Sts., New York.

Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

AGAINST

THE WESTERN UNION TELEGRAPH COMPANY and THE UNION PACIFIC RAILWAY COMPANY,
Defendants in Error.

BRIEF OF DEFENDANT THE WESTERN UNION TELEGRAPH COMPANY.

Facts.

The claim of the Government in this case is to recover $12,495.62 claimed to have been improperly collected by the defendant The Western Union Telegraph Company for telegraph services rendered. The claim embraces very many items of a long account of payments made for telegraph services rendered in sending messages for different agents of the Government from many different points in the United States.

All of the matter embraced in the different messages was transmitted over telegraph lines situated upon the right of way of the Union Pacific Railway Company,

upon such divisions as received grants of bonds, and the amounts which the Government claims to have been improperly collected is such proportion of the amount as passed over the bond-aided portions of the Union Pacific Railway. The theory of the Government in the suit is that under the act of Congress passed on the 7th day of May, 1878, known as the "Thurman Act," all compensation for service upon the telegraph lines upon the bond-aided portions of the Union Pacific Railway are entitled to be withheld by the Government and applied to the payment of the indebtedness of the railway company to the United States; that the Western Union collecting for telegraph services rendered wholly or partially upon telegraph lines thus located, has collected the same improperly, and therefore holds the money as a trustee for the benefit of the Government, and that it is entitled in this suit to recover the same of the telegraph company.

The items in the account are a certain proportion of the amounts which were paid by the Government during the years 1882 and 1883 for telegraphic services in sending messages and Signal Service reports for the Government. These messages were of three classes: 1st, messages sent from a point on the Western Union lines away from the subsidized railroads to a point upon the lines of one of the subsidized divisions of the Union Pacific Railway, or sent from a point on one of the subsidized divisions of the Union Pacific Railway to a point on the Western Union lines from the Union Pacific lines. 2d, messages sent from a point on the subsidized portion of the Union Pacific lines to another point on a subsidized portion of the Union Pacific lines.

3d, messages transmitted as Signal Service reports from a point on the Western Union lines away from the Union Pacific Railroad to a point or points on the Union Pacific Railroad, or from a point on the Union Pacific Railroad to other points on that railroad and to points on the Western Union lines away from the Union Pacific; these reports in all cases, however, not being sent as ordinary messages, but transmitted over what is known in telegraphic operations as a "circuit;" a "circuit" being one continuous, connected wire from the point of sending to the ultimate point of receiving, with operators stationed at intermediate places, all the places upon the circuit receiving the report at one and the same time, and by one sending from the point of origin of the report. The intermediate places at which operators thus receive the report thus transmitted are known as "drops."

All of the foregoing classes of messages were settled and paid for to the Western Union Telegraph Company upon a basis fixed by the Postmaster-General of the United States for such services, and which was assented to by the Telegraph Company.

The claim is now made by the Government, as to the first class of messages spoken of above, that it is entitled to recover from the Western Union Telegraph Company such *pro rata* portion of the entire amount paid as the mileage of the subsidized portion of the Union Pacific Railway Company's lines bears to the entire distance of the lines over which the message was transmitted from the point of origin to the point of destination.

As to the second class of messages, the claim is made that the Government is entitled to recover the entire amount paid for transmission.

And as to the third class of messages, it is claimed that there is a right to a recovery upon a *pro rata* basis precisely the same as in the first class.

The claim in each case is based upon the provisions of the Act of May 7th, 1878, known as the "Thurman Act," under which the United States was entitled to retain the whole amount of compensation earned by the Union Pacific Railway Company for services rendered to the Government, and apply one-half to the liquidation of interest on bonds issued by the United States on behalf of said Railroad Company, and the other half to be turned into the Sinking Fund provided by that act. A determination of this claim as respects each class of messages referred to will involve a careful consideration of the facts and circumstances under which the services were rendered, the history of the properties of both defendants and of the rights of the respective parties.

First. As to messages transmitted over that portion of the Union Pacific Railway between Omaha and Ogden in whole or in part.

The Union Pacific Railroad Company was authorized by Act of Congress of July 1st, 1862, to build and maintain a railroad and telegraph line upon the routes named in the act (12th U. S. Statutes, 489). Section 6th of the act relating to this matter, so far as material to the question under consideration, provides that:

"The grants aforesaid are made upon conditions that
"said company shall pay said bonds at maturity, and
"shall keep said railroad and telegraph line in repair
"and use, and shall at all times transmit dispatches

" over said telegraph line, and transport mails, troops " and munitions of war, supplies and public stores upon " said railroad for the Government whenever required " to do so by any department thereof; and that the " Government shall, at all times, have the preference in " the use of the same for all the purposes aforesaid at " fair and reasonable rates of compensation, not to ex- " ceed the amounts paid by private parties for the " same kind of service, and all compensation for services " rendered for the government shall be applied to the " payment of said bonds and interest, until the whole " amount is fully paid."

By Act of July 2d, 1864, this section was modified by providing that but one-half of the compensation should be retained by the Government on behalf of the bonds issued by it. By the Act of May 7th, 1878, the full amount provided for in the original act to be retained was again required to be retained.

Under these Acts of 1862 and 1864, the Union Pacific Railroad Company proceeded to construct and did construct both a railroad and a telegraph line between Omaha and Ogden, and began the operation of the same some time in the year 1869. By the 19th section of the Act of July 1st, 1862, it was provided that—

" The several railroad companies herein named are " authorized to enter into an arrangement with the " Pacific Telegraph Company, the Overland Telegraph " Company, and the California State Telegraph Com- " pany, so that the present line of telegraph between " the Missouri River and San Francisco may be moved " upon or along the line of said railroad and branches, " as fast as said road and branches are built; and if " said arrangement be entered into and the transfer of " said telegraph line be made in accordance therewith " to the line of said railroad and branches, such trans- " fer shall, for all purposes of this act, be held and con- " sidered a fulfillment, on the part of said railroad com- " panies, of the provisions of this act, in regard to the " construction of said line of telegraph; and, in case of " disagreement, said telegraph companies are authorized " to remove their line of telegraph along and upon the

" line of railroad herein contemplated, without preju-
" dice to the rights of said railroad companies named
" herein."

As indicated by the 19th section above quoted, the telegraph companies therein named, prior to the passage of this act, had already constructed and put in operation lines of telegraph substantially upon the route afterwards adopted by the Union Pacific Railroad Company. Acting under the authority of this 19th section, and without any agreement with the Union Pacific Railroad Company, these telegraph companies transferred their lines to the right of way of the Railroad Company, as fast as the railroad was constructed, and thereafter maintained and operated the same along and upon the right of way of the railroad company, in connection with other telegraph lines owned by them or by telegraph companies with which they had working connections. The telegraph companies named in this section subsequently were merged in the Western Union Telegraph Company, the defendant herein, by lease, sale or consolidation, and the latter company, from the dates of such lease, sale or consolidation, has continuously maintained and operated these lines as a part of its general system of telegraph lines, covering the entire United States, and independently of the Union Pacific Railroad Company. On or about the 1st day of July, 1881, a certain written contract was entered into by the two defendants.

In order fully to outline the facts and present the exact situation of the parties it should, perhaps, be stated that the Atlantic and Pacific Telegraph Company entered into a contract in 1879 with the Union Pacific Railway Company, and thereby leased the lines of the railroad company and operated the same until on or about

the 1st day of February, 1881, when it was merged in the Western Union Telegraph Company by consolidation.

From the year 1869 to the year 1881 upon the line of the Union Pacific Railway Company, between Omaha and Ogden, there were two independent lines of telegraph, the one operated by the Western Union Telegraph Company, and the other operated by the Atlantic and Pacific Telegraph Company, but being the line of telegraph built by the railroad company. Under the contract of July 1, 1881, the separation of these lines of telegraph and their operation independently of each other continued. The railway company by the contract of July 1, 1881, had apportioned to it three wires between Omaha and Ogden subject to its exclusive use and control. The Western Union Telegraph Company retained possession of the wires which it had owned and operated ever since their construction in the year 1881. The contract of July 1, 1881, did provide that some of the wires of the Western Union Telegraph Company should connect with the stations of the railway company, and from those stations the operators of the railway company should forward any messages which should be delivered in the railway stations for transmission over the Western Union lines, or over the railway lines as might be required by the Government or the public.

The defendant the Western Union Telegraph Company on the 7th of June, 1867, formally accepted the provisions of the Act of Congress of July 24th, 1866, and since on or about January 1st, 1873, has, in consequence thereof, had the rates at which it should be compensated by the Government for sending Government messages fixed by the Postmasters-General. The

Union Pacific Railroad Company or its successor by consolidation, the Union Pacific Railway Company, the defendant herein, has never accepted the provisions of the Act of July 24th, 1866, but in all respects remains subject to the provisions of the Acts of July 1st, 1862, and July 2d, 1864, and acts amendatory thereof, as respects the operation of its railroad and telegraph lines. These acts fixed the measure of the railway compensation for government service "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of services." The rates thus fixed by the Postmaster General for the telegraph company have, at all times, been considerably lower than the ordinary commercial rates, to the public, of the Western Union Telegraph Company or of the Union Pacific Railway Company. All the messages in these accounts sent between Omaha and Ogden in whole or in part were sent by the telegraph company, and paid for by the Government at the low rate fixed by the Postmasters-General, and as to a majority of the messages were sent over a route of which the Union Pacific Railroad formed but a small part. They were sent at a compensation calculated for the entire distance as a unit, and different from what the compensation would have been figured over the Western Union lines to point of connection with the lines of the Union Pacific, and then calculated from that point to the point of destination.

Second. As to the Kansas Pacific Railway, the facts differ in some particulars from those relating to the Union Pacific between Omaha and Ogden.

By the 4th section of the Act of Congress of July 2, 1864 (Thirteenth U. S. Statutes, 373) it is provided that

"The several railroad companies authorized by act "of Congress, July 1, 1862, are authorized to enter into "arrangements with the United States Telegraph Com- "pany so that the line of telegraph between the Mis- "souri River and San Francisco may be made upon "and along the line of said railroad and branches, as "fast as said road and branches are built; and if said "arrangements be entered into, and the transfer of "said telegraph line be made in accordance therewith "to the line of said railroads and branches, said trans- "fer shall, for all purposes of the act referred to, be "held and considered a fulfillment on the part of said "railroad companies of the provision of the act in re- "gard to the construction of a telegraph line; and in "case of disagreement said telegraph companies are "authorized to remove their line of telegraph along "and upon the line of railroad therein contemplated, "without prejudice to the rights of said railroad com- "panies."

When the Railroad Company began to construct its line of railroad the United States Telegraph Company under this section of the act removed so much of its line as was then built to the railroad, and entered into contract relations with the Railroad Company, and as fast as the railroad was constructed built its telegraph lines along and upon the right of way of the Railroad Company, and operated and maintained the same, and continued to do so until its amalgamation with the Western Union Telegraph Company in February, 1866, after which time the latter company continued to build

telegraph lines along the railroad, so fast as the same was constructed, and has ever since maintained and operated the same. The Railroad Company constructed no line of telegraph, but this line, thus constructed, was accepted by the Government as a fulfillment of the obligations of the Railroad Company under the acts cited.

The Western Union Telegraph Company continued to operate these lines until July 1st, 1881, when the new contract with the Union Pacific Railway Company was entered into. Since this last date the operation of these lines has been under and in accordance with the provisions of that contract. The essential features of the contract in that respect are that there are two independent lines of telegraph, each of the defendants having one in its exclusive control. The facts as to the origin and destination of messages, the basis for determination of amount paid for the same, the rates for the same, &c., are the same as to the messages sent over the main line of the Union Pacific Railway.

The third class of messages relates wholly to Signal Service Reports, which form a special class of messages.

These are voluminous and, as has been already noticed, are not sent as ordinary messages from one point to another point, but are sent from one point to a number of other points at one and the same time. The number and arrangement of the circuits for sending this class of messages was fixed by the Government through the Postmaster-General and the Telegraph Company; and the circuits in all cases covered by the accounts involved in this action, embraced points on and off of the lines of telegraph

situated upon the right of way of the Union Pacific Railway Company. The circuit in all cases, therefore, was composed of one continuous wire extending over points situated at considerable distances from lines on the Union Pacific Railway Company, and which could not be reached by lines of telegraph owned, and constructed by that company under the provisions of any of the acts of Congress named. The compensation paid was likewise at a special rate, dependent upon the extent of the circuit, the amount of matter sent, the time of sending, and the number of "drops" at the intermediate points in the circuit; and the rate was so much per word for the entire circuit. A right to recover a mileage proportion, as in the first class named, is likewise claimed by the defendant.

ARGUMENT.

I.

As to the first class of messages, the Government made its election of one of two agencies to whose services it was entitled, at rates fixed by the Postmaster-General for the telegraph company, and having made such election and received the benefit thereof in the special rate, cannot now be heard to say that it is entitled to have a portion of the rate impounded under the "Thurman Act."

From the facts already stated, it is evident that, so far as the main line of the Union Pacific Rail-

way is concerned, there were two separate and independent lines along and upon the right of way, and however we may consider the effect of the contract of July 1st, 1881, as to vesting in The Western Union Telegraph Company franchises and powers personal to the Union Pacific Railway Company, so far as respects the operation of the latter company's telegraph lines, still that contract did not change the status of the lines which the predecessors in interest of the Western Union Telegraph Company had constructed along and upon the same right of way, but those lines remained the same as theretofore, independent of the railroad company, and the railroad company's obligations to the Government under the Acts of July 1st, 1862, July 2d, 1864, and May 7th, 1878. As prior to July 1st, 1881, when the railroad company was operating its own lines and the Western Union Telegraph Company was operating its lines upon the same right of way, the Government could elect to send by either of said agencies its messages, as it or its agents should find most convenient and desirable, so after the making of the contract of July 1st, 1881, the Government or its agents could equally elect whether it would insist upon its rights under the Act of July 1st, 1862, and amendatory acts, against the railroad company, or deal with, and have its messages transmitted by the Western Union Telegraph Company as an independent outside agent under the contract made with that company under the Act of July 24th, 1866. The fact that it has chosen to have those messages sent and paid for at the rates fixed by the Postmaster-General upon the lines of The Western Union Telegraph Company, which are subject to the direction of the Postmaster-General, while the railway telegraph lines are not thus subject, is con-

clusive evidence to the effect that it has contracted through its officers, that those messages should be transmitted throughout by the Western Union Telegraph Company, and that as to those messages it did not contract with the Union Pacific Railway Company. On the basis of such contract with the telegraph company, the services were rendered, the account was rendered therefor and has been adjusted. No question is made that, at the Postmaster-General's rates calculated for the entire distance these messages were sent, the account as paid by the Government is correct. The Government now seeks to repudiate the contract it has made, and fully carried out with the Telegraph Company, and to treat these messages as forwarded from the point of origin to a point of connection with the Union Pacific Railroad lines, and then over Union Pacific Railroad lines to point of destination, or as forwarded in some cases entirely over the Union Pacific Railroad lines. If the Government has the privilege of doing this extraordinary thing (which we cannot conceive), yet it is not entitled to recover the *pro rata* that it has claimed in its complaint, but it must show what the rate would have been upon the basis of a connection of the telegraph lines of the defendants, and what amount of excess The Western Union Telegraph Company has collected from it upon that basis. There is nothing in the case to show what the commercial rates were as to these accounts, nor the calculation as to what the cost of sending these messages would have been upon the basis upon which the Government was bound to make compensation to the railway company. But even the right to do this is denied by the defendant. The circulars of the Postmaster-General, the sending of the messages, the pay-

ment for them, establish an executed contract with the telegraph company, which the plaintiff cannot arbitrarily set aside at will. It is evident that, as to the lines of the Union Pacific Railway Company, the Government is not entitled to have the service done at the rates fixed by the Postmaster-General. The Union Pacific Railroad Company never accepted the Act of 1866; but the Act of July 1st, 1862, provides (and it is the measure of the obligation of the Government, as well as of the duty of the Union Pacific Railway Company), that the standard of rates the Government should pay should be "fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service." If the contract had been made with the railway company, and the service performed by it, then the rates to the Government would have been the regular commercial rates, which were considerably higher than the Postmaster-General's rates.

The claim may be made that the rate fixed by the Act of July 1st, 1862, is not necessarily the same as the ordinary commercial rate as fixed for private parties: but under the operations of the Act of May 7th, 1878, it would seem to be a very serious question whether the Union Pacific Railway Company could be permitted to make a less rate to the Government than is fixed for private parties for the same kind of service, because all the results of such service by the Thurman Act are pledged to the payment of the bonds issued to aid in the construction of its road.

These considerations apply equally, whether the message was transmitted entirely between points on lines of the Union Pacific between Ogden and Omaha, or was only partially transmitted over lines along the

Union Pacific Railway Company; because in either case the rate over that portion of the road for which recovery is sought in this case would be greater than the amount which the Government has paid for the same; while there is no showing, and can be none that by the division of the route, and the transfer at the point of connection with the Union Pacific line, any diminution in the rate would be made. The irresistible conclusion therefore, is that when these messages were filed in the office of the Western Union Telegraph Company, with no specific instruction that they were to be sent over the lines of Telegraph of the railroad company, they were to be transmitted by the Western Union Telegraph Company over its own lines, and not over the lines of the railroad company, and thereby was created a contract with the telegraph company which the Government cannot, after its complete performance, set aside and substitute another of entirely different terms in its stead.

It is to be noted that there is nothing in any of the statutes relating to The Union Pacific Railroad Company (and which define the contract between that company and the Government) *to require* the Government or its agents to prefer the lines of the railroad company, even as to such messages as the railroad company could wholly transmit and deliver over the lines of the telegraph company. Nowhere in these statutes is there any indication of an intention to discriminate in the distribution of its business in favor of the railroad telegraph company's line. It had the option to employ it as much or as little as it chose. In the charter it required the railway company to stipulate to be ready to serve it when required to do so. With the commercial rate, therefore, considerably higher on the

Union Pacific lines than the Postmaster-General's rate on the Western Union lines, it is very easy to see how the pecuniary considerations involved, originally induced the Government to employ the Telegraph Company to the exclusion of the Railroad Company.

II.

Neither Section 19 of the Act of July 1st, 1862, nor Section 4 of the Act of July 2d, 1864, in terms or by implication, subjects the telegraph companies whose rights are therein provided for to the terms of the contracts of the Government with the various subsidized railroad companies.

The contracts with the railroad companies named in the Act of July 1st, 1862, and acts amendatory and supplemental thereof, provide for a repayment by the railroad companies to the Government of the bonds, principal and interest, advanced by the Government as an aid to the companies in the construction of their lines. One condition of this contract material in this case is that for services rendered by these companies to the Government, a certain portion, or all of the compensation shall be retained by the Government for application to the payment of interest paid by the Government, and ultimately for the payment of the principal of the bonds. In Sections 19 of the Act of 1864, and 4 of the Act of 1864, there is no reservation by the Government of the right to withhold any part

of the moneys paid to the telegraph companies therein named for services rendered by them to the Government. As Justices MILLER and MCCRARY have held, they were given the right, either with or without agreement, to transfer their lines and business to the right of way of the Railroad Company, and there to do business for all who might call upon them to provide telegraph facilities, and, thus doing business for all, are entitled to receive pay from all alike for the business thus done. The Government is no more favored in this respect, as a customer, than is a private individual, and reserves no peculiar rights to itself under the provisions of these sections.

American Union Telegraph Company vs. The Union Pacific Railway Company *et al.*, 1st McCrary's Reports, 188.

The Western Union Telegraph Company vs. The Union Pacific Railway Company, 1st McCrary's Reports, 418.

The Atlantic & Pacific Telegraph Company vs. The Union Pacific Railway Company, 1st McCrary's Reports, 541.

The Western Union Telegraph Company vs. The Union Pacific Railway Company, 1st McCrary's Reports, 558.

The provisions of the Acts of 1862, 1864, and acts amendatory and supplementary thereof, constitute the contract between the United States and the Union Pacific Railway Company.

United States vs. C. P. R. R. Co., 118 U. S., 235.

United States vs. U. P. R. R. Co., 91 U. S., 72.

Sinking Fund Cases, 99 U. S., 700.

U. P. R. Co. vs. United States, 104 U. S., 662.

When the United States in this contract absolved the railroad company, under the conditions therein named, from the obligation to build and maintain telegraph lines, it did not provide that the telegraph companies which the railroad company might substitute for itself should become agents of or subordinate to the railroad companies in respect to Government business, nor that they should treat with the Government through the railroad companies, nor that they should become subject to any of the obligations of the contract with the railroad company, but that the Government should employ them as it employs any other individual, subject to the implied obligation in every case to pay a reasonable value for the service rendered. Not only this, but the reason for the impounding of all or a portion of the compensation due from the Government to the railroad company, whether for telegraphic services or for transportation services on the railroad, does not in any sense apply to the telegraph companies named in these sections. The railroad company received from the Government large numbers of bonds, the principal and interest of which the Government was obligated to pay, and as a means of protecting itself in the payment the Government very properly provided, in the body of these acts, for a means of securing to itself moneys which it was expected would be sufficient to secure the repayment to it of all advances in this respect to the railroad companies; but no such advances of bonds were made to the telegraph companies. They received nothing from the Government, and the reasons which were controlling in the enactment of the regulations, with respect to the railway companies, have no application whatever, so far as the telegraph companies are concerned.

The telegraph companies did not, in any sense, become parties to the contract between the Railroad Companies and the Government, as found in the Pacific Railroad Acts, nor did they in any way assume like obligations with the Railroad Company, when they erected their telegraph lines along and upon the Railroad Company's right of way, either with or without an arrangement with the railroad companies, but in all respects remained free contracting parties for the business of the Government, and as such were entitled to receive full compensation for services rendered to it, when the services were rendered. The only respect in which the telegraph companies have modified this condition is in accepting the provisions of the Act of July 24th, 1866.

III.

All the foregoing considerations apply with full force to the accounts for services upon lines along and upon the Kansas Pacific branch of the Union Pacific Railway Company.

Upon this branch of the railway, however, we have the added consideration that, by the third section of the Act of July 2d, 1864, entitled "An Act for Increased Facilities of Telegraphic Communication between the Atlantic and Pacific States and the Territory of Idaho," it is provided that "the aforesaid company (The United States Telegraph Company) is authorized by this act to send

and receive despatches on payment of the regular charges for transmission of despatches, over any line that may now or hereafter be constructed by authority or aid of Congress." It is not claimed that this section adds anything to the rights of this Telegraph Company or its successor upon this line of the railroad, so far as the present controversy is concerned. It is simply declaratory of the rights of the Telegraph Company and of the law relating to them, as already urged in this argument with respect to the main line from Omaha to Ogden. To hold otherwise would be to hold that, by this section Congress intended to discriminate on behalf of this company in respect to payment for services, as against the other companies named in the 19th Section of the Act of 1862. There is no evidence of any intention so to do in any of the legislation; and no reason for such favoritism in any respect is suggested with reference to this Telegraph Company.

The Western Union Telegraph Company, as the legitimate successor of the United States, and other telegraph companies, had, then, the clear right to demand and receive from the Government compensation for telegraph services rendered at the request of Government officers upon lines of its own located along the Union Pacific Railway, at the Postmaster-General's rates, regardless of the question of whether the railroad company upon whose right of way these lines were situated was indebted to the Government or not.

V.

The third class of accounts relates to a special service, which the Union Pacific Railway Company, in the very nature of the case, could not perform.

As we have had occasion to remark heretofore, this service was upon what are known in telegraphic parlance as "circuits;" and an examination of the accounts in this case would show that these circuits were made up in each case from a point off of the lines of the Union Pacific Railway Company to a point upon those lines, or from a point on those lines to a point on the Western Union lines; as, for example, from San Francisco to Denver, or from Denver to Chicago; the circuits embracing a number of intermediate points, at which the Signal Service reports were "dropped," as they were being sent from their point of origin to their point of destination. To perform this service required unity of control and direction over the entire circuit. It required that between the points covered by the circuit there should be one continuous connected telegraph line, with all the operators subject to the one control and ready to act harmoniously and simultaneously. Possesssing the limited lines which it had, the Union Pacific Railway Company could not make up such circuits as were required in the transmission of these Signal Service reports. By the acts of Congress it was required to construct, and did, in fact, construct, telegraph lines from Omaha to

Ogden only; and examination will show in the case of each circuit that the Signal Service reports, in the accounts sued upon in this case (and which constitute the bulk of the amount the Government claims the right to recover) were not limited to such lines, nor were the circuits in any case limited to lines along any of the divisions of the railway company, aided by bonds or grants of land.

These considerations demonstrate fully and conclusively the impossibility of the Union Pacific Railway Company complying with the needs of the Secretary of War in respect to these reports; nor could it, as in the case of an ordinary commercial message, furnish even a portion of the service. In the case of an ordinary commercial message, for instance, from New York to San Francisco, it is possible to transmit it from New York to Omaha by the Western Union Telegraph Company's lines, and there deliver it to the Union Pacific Railway Company's lines, as a connecting line, and again to receive it at the terminus of the Union Pacific Railway lines at Ogden. But this sort of connection, whereby the Union Pacific Railway Company could perform its portion of the work, in the case of an ordinary commercial message for the Government, was not a possible thing in the case of Signal Service reports.

Another consideration is worthy of note here, and that is, that the making up of these Signal Service circuits is a matter of special agreement between the Government and the telegraph company making them. The Western Union Telegraph Company, under the Act of July 24, 1866, was not under obligation to make up these special circuits for the Signal Service reports,

as this account shows it has done between various points with many intermediate drops. That act simply required it to give the preference to the Government messages in transmission, and at such rates as the Postmaster-General shall annually fix (Section 5266, Revised Statutes). Section 221 of the Revised Statutes provides that

"The Secretary of War shall provide for taking "meteorological observations at the military stations "in the interior of the continent and at other points in "the States and Territories, and for giving notice on "the Northern lakes and sea coast by magnetic tele- "graph and marine signals of the approach and force "of storms."

But neither of these sections provides for such service as was rendered by the Telegraph Company to the Government in this case. It was a special and extraordinary service, for which a particular rate has been fixed by agreement with the Postmaster-General at not exceeding three cents a word for each word sent over the entire circuit, and such rate has been properly paid to the Western Union Telegraph Company, because it alone could and did provide the service.

V.

The payment by the Government to the Telegraph Company of the rates fixed by the Postmaster-General, as shown by the account in the bill of particulars, was

in accord with the contract between the Government and the Telegraph Company and with the reason of the case, as well as with the settled practice of the Government, until the letter of the Second Comptroller of the Treasury, under date of February 5th, 1886, introduced a new and erroneous view of the rights and duties of the Union Pacific Railway Company and the Western Union Telegraph Company.

Under the principle suggested in that letter, the accounts between the Government and the Western Union Telegraph Company, which had been passed upon, approved and paid, have been recast, and this action is the result of an attempt to recover back from the Western Union Telegraph Company in accordance with the principles laid down in the letter of the Second Comptroller and in violation of the agreement under which the business was done. A short examination of the letter, therefore, may aid in arriving at a correct conclusion in this case. Beginning at the second paragraph, we find the material parts of his letter bearing upon this question are as follows:

"By Section 6 of the Act approved July 1st, 1862 "(12th Statute, 489), it was provided that the granting "of the right to operate a telegraph line thereunder "was made upon the condition that the company op- "erating the same should pay the bonds issued in aid "of its construction at maturity, and should keep the "telegraph lines in repair and use, and should at all "times transmit dispatches over the same for the Gov- "ernment whenever required to do so by any Depart- "ment thereof; and that the Government should at all "times have the preference in the use of the same for "all purposes, at fair and reasonable rates of compen-

" sation, not to exceed the amount paid by private par-
" ties for the same kind of service ; and that all com-
" pensation for such services should be applied to the
" payment of the bonds and interest until the whole
" amount is fully paid.

" This provision was so far modified by Section 5 of
" the Act of 1864 (Thirteenth Statutes, 356) that only
" one-half of the compensation for such services for the
" Government was required to be applied to the pay-
" ment of subsidy bonds ; and by the provisions of the
" Thurman Act, approved May 7th, 1878 (Twentieth
" St., 50), it was again provided that the whole amount
" of compensation to railroad companies operating
" these telegraph lines for service rendered to the
" Government should be retained by the United States
" and applied in the manner provided in that act.

" It also appears by the records of the Interior De-
" partment that various private companies have ac-
" quired from the subsidized Pacific Railroad Com-
" panies, by contract or lease, or otherwise, the right
" to operate telegraph lines alongside of and occupying
" the same territory as such railroads, and that in so
" doing they have assumed all the burdens and liabilites
" imposed by the several acts referred to upon these
" railroad companies in the operation of their tele-
" graph lines, and that the rights and privileges of the
" Government are not in any wise affected or prejudiced
thereby."

From this quotation (and there is nothing in the subsequent part of the letter to modify it) it is evident that, in rendering his opinion, the Comptroller simply considered and had reference telegraph lines constructed by the Railway Companies and subject to the provisions of Section 6 of the Act of July 1st 1862. No fault whatever could be found with his conclusion if Section 6 alone applied to and controlled the parties in this controversy. His conclusions would follow as a necessary consequence of the provisions of Section 6 ; but, as shown by the opinions of Justices MILLER and MCCRARY, above cited, Section 19

of the Act of 1862 and Section 4 of the Act of 1864, and the construction and continued operation of telegraph lines thereunder by the telegraph company, independent of the Railway Companies, make a very material alteration in the rights of the Government, and the obligations of the telegraph and railroad companies. All that needs to be said, therefore, with respect to this letter is that its reasoning is correct, but that it proceeds from an imperfect knowledge of the facts of the case. His conclusions, therefore, are erroneous and should not be followed by the Court in this action. They are opposed by the decisions to which reference has been made, and are not sustained by reason or the facts.

RUSH TAGGART,
Attorney for Western Union Telegraph Co.

Nov. 10, '94—30.